A

CIMB BANK BHD

v.

DATO' TIO SIAN PAH & ANOTHER CASE

B

HIGH COURT MALAYA, KUALA LUMPUR
AMELIA TEE HONG GEOK JC
[CIVIL SUITS NO: D6-22-314-2006 & D6-22-708-2006]
5 AUGUST 2010

C ***BANKING:*** *Banks and banking business - Securities - Pledged shares - Bank having absolute discretion to sell shares as security in satisfaction of sums due - Whether legal obligation on bank to consult borrower before disposing pledged shares*

D ***CIVIL PROCEDURE:*** *No case to answer - Effect of a defendant electing not to call evidence - Whether plaintiff will automatically succeed in its claim*

CONTRACT: *Breach - Facility agreement - Failure to settle term loan by final maturity date - Whether event of default had occurred - Reliance* E *on certificate of indebtedness as proof of sums due and owing - Borrower failing to prove defence of set off on a balance of probabilities*

EVIDENCE: *Adverse inference - Evidence Act 1950, s. 114(g) - Defendant choosing to close its case at end of plaintiff's case - Whether* F *adverse inference may be drawn for failure to tender evidence - Whether s. 114(g) restricted to situations where a party has called evidence*

EVIDENCE: *Documentary evidence - Agreed bundle - Document included in part B - Effect of - Document admitted as authentic - Calling* G *of makers dispensed with - Whether truth of their contents may be challenged*

The plaintiff in D6-22-314-2006 was CIMB Bank Berhad ("CIMB") and the defendant was Dato' Tio Sian Pah ("Dato' Tio"). In D6-22-708- 2006, the plaintiff was Leovest Sdn Bhd H ("Leovest") and the defendant was CIMB. Both suits were consolidated and heard together. In D6-22-314-2006, CIMB's claim against Dato' Tio was for a sum of RM5,414,982.86 being the sum outstanding in respect of a term loan and an overdraft facility granted by them to Dato' Tio. Dato' Tio contended that I there was no event of default and no proper recall of the term loan. The term loan was secured by 1,563,000 Polymate Holdings Berhad ("PHB") shares belonging to Leovest and 5,450,307 PHB

shares subscribed to by Dato' Tio. Dato' Tio pleaded that in breach of the agreement between the parties, CIMB had failed to dispose of the PHB shares as agreed and had only disposed of 2,000,000 shares thus causing him loss and damage. He thus counterclaimed for a sum of RM2,898,257.80 being the amount that he would have realized if the remaining 3,450,307 PHB shares pledged by him had been disposed off. In respect of D6-22-708-2006, Leovest's claim against CIMB was for damages for breach of fiduciary duties and duty of care in failing to dispose of the PHB shares pledged to secure the term loan facility granted to Dato' Tio. Leovest contended that had CIMB disposed off the shares in January 2005 as agreed, it would have realized between RM1,250,400 and RM1,312,920. CIMB on the other hand claimed that it had acted in good faith when administering the term loan and overdraft facility. It was contended that there was never an agreement between CIMB, Leovest and Dato' Tio to dispose of all the shares pledged and to use the proceeds towards settlement of the term loan granted to Dato' Tio. Neither Dato' Tio nor Leovest gave evidence in court. It was submitted that CIMB, the plaintiff in 22-314-2006, had not established a case on a balance of probabilities. In respect of 22-708-2006, it was submitted that Leovest would be relying on the documents in part A of the ikatan dokumen and on the testimony of plaintiff's witnesses to prove its case.

Held:

(1) It does not automatically follow that where a defendant calls no evidence, a plaintiff will succeed in its claim. The more accurate statement of the law is as stated by His Lordship Peh Swee Chin FCJ in *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor.* (para 35)

(2) All the documents in question were, with the agreement of both parties, placed in part B of the ikatan dokumen. In the absence of any express condition regarding the inclusion of these documents in part B, it would mean that "the documents therein are authentic and they do exist, therefore they require no proof of their authenticity by calling for eg, their makers". The truth of their contents however may be challenged in court at the instance of either party. Dato' Tio and Leovest were misconceived when they contended that the documents in part B were inadmissible without calling their makers. (paras 46 & 47)

(3) Dato' Tio did not settle the term loan by the final maturity date of 4 December 2004. CIMB had established that an event of default had occurred and that Dato' Tio, by failing to pay the amount claimed or to respond in any way to the letters of demand, was in breach of the facility agreement. (para 50)

(4) The conclusive evidence clause in the general facility agreement entitled CIMB to rely on the certificate of indebtedness as proof that as at 31 December 2005, a sum of RM5,414,982.86 was due and owing from Dato' Tio to CIMB in respect of the term loan and the overdraft facility. (para 61)

(5) Section 114(g) of the Evidence Act 1950 is not restricted to situations where a party has called evidence. A defendant who chooses to close its case at the end of a plaintiff's case is entitled to do so, but would be in peril of not having the evidence of their most important witness but also of having an adverse inference drawn against them; *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* (refd). (para 64)

(6) The memoranda of deposit of stocks and shares executed by Dato' Tio and Leovest clearly entitled CIMB to sell the mortgaged property. During the continuance of the security, CIMB had the absolute prerogative to sell or otherwise dispose of the pledged shares at any time it deemed fit. There was no legal obligation on the part of the bank to consult with Dato' Tio before disposing of any part of the pledged shares. CIMB had not acted injurious to Dato' Tio or Leovest and had not acted inconsistent with their rights. (para 65)

(7) Dato' Tio had, in his own letters dated 29 June 2005 and 9 August 2005, admitted that the loan was due and owing and had in fact extended his appreciation for the loan. In both letters, he did not dispute his liability for the loan but was merely asking for time to settle the debt. Since Dato' Tio had admitted taking the loan, the burden thus fell on him to produce evidence to avoid liability. In light of his decision not to give any evidence in support of his case Dato' Tio had failed to prove his defence of set off on a balance of probabilities. Similarly, Leovest had failed to make out its case against CIMB on a balance of probabilities. (paras 73 & 74)

[Order accordingly.]

Case(s) referred to:

Allied Bank (Malaysia) Bhd v. Yau Jiok Hua [1998] 2 CLJ 33 HC ***(refd)***

Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA ***(refd)***

Borneo Co (M) Sdn Bhd v. Penang Port Commission [1975] 1 LNS 5 FC ***(refd)***

Caley Ototo Worldwide Sdn Bhd v. Sun Wen Long [2010] 1 CLJ 725 HC ***(refd)***

Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(refd)***

China & South Sea Bank Ltd v. Tan Soon Gin, George [1990] 1 CLJ 665; [1990] 3 CLJ (Rep) 398 CA ***(refd)***

Citibank NA v. Ooi Boon Leong & Ors [1980] 1 LNS 168 FC ***(refd)***

Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***

Kulandi Muthu v. Subramaniam Velliappan [1983] 1 CLJ 302; [1983] CLJ (Rep) 603 HC ***(refd)***

Lembaga Kemajuan Tanah Persekutuan v. Mariam Mangu & Ors [1984] 1 CLJ 225; [1984] 1 CLJ (Rep) 197 FC ***(refd)***

Miller (t/a Waterloo Plant) v. Cawley [2002] EWCA Civ 1100 ***(refd)***

Subry Hamid v. Husaini Tan Sri Ikhwan & Anor [2006] 4 CLJ 50 CA ***(refd)***

Tempil Perkakas Sdn Bhd v. Poo Sex Hong (t/a Agrodrive Engineering) [1996] 1 LNS 99 HC ***(refd)***

United Malayan Banking Corp Bhd v. Chen Yin Khee & Anor [2004] 4 CLJ 385 CA ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 73A, 114(g)

Rules of the High Court 1980, O. 14

(Civil Suit No: D6-22-314-2006)

For the plaintiff - SC Cheah (SW Mar & CL Yap with him); M/s Adnan Sundra & Low

For the defendant - Colin Pereira (MS Wong with him); M/s Goh, Wong & Pereira

(Civil Suit No: D6-22-708-2006)

For the plaintiff - Colin Pereira (MS Wong with him); M/s Goh, Wong & Pereira

For the defendant - SC Cheah (SW Mar & CL Yap with him); M/s Adnan Sundra & Low

Reported by Amutha Suppayah

JUDGMENT

Amelia Tee Hong Geok JC:

[1] The plaintiff in D6-22-314-2006 is CIMB Bank Berhad ("CIMB") and the defendant is Dato' Tio Sian Pah ("Dato' Tio"). In D6-22-708-2006, the plaintiff is Leovest Sdn Bhd ("Leovest") and the defendant is CIMB. Upon the application by Dato' Tio, the court had allowed an application for the two suits to be consolidated and heard together.

The Pleadings

[2] In D6-22-314-2006, CIMB's claim against Dato' Tio is for a sum of RM5,414,982.86 being the sum outstanding in respect of a term loan and an overdraft facility granted by them to Dato' Tio, interest and costs. CIMB's claim is disputed by Dato' Tio who contends that there was no event of default and no proper recall of the term loan. The term loan was secured by 1,563,000 Polymate Holdings Berhad ("PHB") shares belonging to Leovest and 5,450,307 PHB shares subscribed to by Dato' Tio. In para. 10 of the statement of defence, Dato' Tio pleads that in breach of the agreement between the parties, CIMB had failed to dispose of the PHB shares as agreed and had only disposed of 2,000,000 shares thus causing him loss and damage. He thus counterclaims for a sum of RM2,898,257.80 being the amount that he would have realized if the remaining 3,450,307 PHB shares pledged by him had been disposed off.

[3] In respect of D6-22-708-2006, Leovest's claim against CIMB is for damages for breach of fiduciary duties and duty of care in failing to dispose of the PHB shares pledged to secure the term loan facility granted to Dato' Tio, such damages to be assessed. It is Leovest's contention that had CIMB disposed off the shares in January 2005 as agreed, it would have realized between RM1,250,400 and RM1,312,920. CIMB, in disputing Leovest's claim, contends that it had acted in good faith at all material times when administering the term loan and overdraft facility. It contends that there was never an agreement between CIMB, Leovest and Dato' Tio to dispose of all the shares pledged and to use the proceeds towards settlement of the term loan granted to Dato' Tio.

[4] Initially, the plaintiff in D6-22-314-2006 and the defendant in D6-22-708-2006 was Bumiputra-Commerce Bank Berhad ("BCBB"). On 26 January 2010, BCBB filed a summons in

chambers to amend the writ of summons and statement of case by amending the name of the plaintiff from "Bumiputra-commerce Bank Bhd (dahulunya dikenali sebagai Bank of Commerce (M) Bhd) (No. Syarikat 13491-P)" to "CIMB Bank Berhad (13491-P)". Amendment was also sought in respect of para. 1 of the statement of claim in D6-22-314-2006 by inserting, after para. 1 the following sub-para. 1.1 as follows:

> 1.1. Melalui suatu Borang Pertukaran Nama menurut peruntukan-peruntukan Akta Syarikat 1965 (Borang 13) bertarikh 7.9.2006, nama BCBB telah ditukar kepada CIMB Bank Berhad (13491-P) ("CIMB").".

There being no objections to this application, the court allowed it with no order as to costs. The court further allowed an oral application for consequential amendment of the pleadings, wherever necessary, arising from the above amendment.

[5] From the very outset, the court was informed by learned counsel for Dato' Tio in D6-22-314-2006 and Leovest in D6-22-708-2006 that neither Dato' Tio nor Leovest would be giving evidence in court.

CIMB's Case

[6] CIMB, the plaintiff in D6-22-314-2006 and the defendant in D6-22-708-2006, called a total of four witnesses. Florence Gnana Sundari (PW1) was the Head of Credit Administration, a section of Group Special Asset Management of CIMB. She had been working with CIMB for 36 years prior to her retirement and had first met Dato' Tio in 1995 or 1996 when she was then the officer-in-charge of the PHB account.

[7] PW1 testified that Dato' Tio was approved a term loan facility of RM6 million for one year with no grace period. The prescribed interest rate was BLR + 2% with provision for late payment interest of 1% per annum on the overdue amount calculated from the due date to the effective date of settlement. Repayment was one bullet repayment of RM6 million one year from the date of full drawdown. Security for the Term Loan Facility were:

(i) A lien over a fixed deposit of RM264,000 which was to be utilized to service the term loan interest

A (ii) A memorandum of deposit of stocks and shares, a letter of consent in respect of advances against shares and contractual agreement over 1,213,000 PHB shares;

(iii) A memorandum of deposit of stocks and shares, a letter of
B consent in respect of advances against shares and contractual agreement over whatever number of PHB shares that were financed under the term loan.

[8] In answer ten of her witness statement, PW1 had testified
C that following the letter of offer dated 19 October 2000, a general facility agreement dated 30 November 2000 was entered into between BCBB and Dato' Tio. However, during cross-examination, she agreed that she did not issue this letter of offer and had no personal knowledge as to its issuance. She had no knowledge as to whose signature appeared at pp. 6 to 10. There
D is no confirmation of acceptance at p. 10 and also no date on the agreement. She explained the date 30 November 2000 was derived from the date the agreement was stamped and she agreed that it could have been signed earlier.

E **[9]** The salient terms of the letter of offer were reproduced in the general facility agreement. During cross-examination, PW1 was asked about item 10 of sch. 1 on additional conditions. She agreed that what it meant was that the amount of the loan should not be above 60% of the value of the shares and that in this case
F the value of the shares pledged at the material time would be valued at about RM10 million. PW1 further confirmed that she had no personal knowledge of the terms of the agreement and that she only came to know about it when the loan came to her department for recovery.

G

[10] A memorandum of deposit of stocks and shares was executed by Dato' Tio (pp. 42-46 of ikatan dokumen) and a similar document was executed by Leovest (pp. 47 to 52). A total of 5,450,307 PHB shares were pledged by Dato' Tio whilst
H 1,563,000 PHB shares were pledged by Leovest. PW1 agreed that while the shares are pledged to the bank, the parties pledging cannot deal with the shares on their own.

[11] *Vide* a letter of offer dated 21 August 2001 (pp. 53-56),
I BCB informed Dato' Tio that it had approved an overdraft facility for a sum of RM50,000. The prescribed interest rate was BLR + 1.75% per annum on daily rest with provision for a penalty interest rate of BLR + 3.5% per annum or such rate as BCBB

may stipulate in the event the overdraft limit is exceeded. PW1 admitted that she had no personal knowledge of this letter of offer.

[12] PW1 testified as to the numerous extensions of the term loan facility. *Vide* a letter dated 27 November 2001 (p. 57), BCBB agreed to extend the maturity date of the term loan facility for another year to 4 December 2002 subject to an extension fee of RM6,000 and no overdue interest in the term loan account. The offer of extension was accepted by Dato' Tio and he signified his acceptance by signing in the acceptance column on the said letter. *Vide* another letter dated 21 November 2002 (p. 58), the maturity date of the term loan facility was again extended, this time to 4 December 2003 subject also to an extension fee of RM6,000 payable on or before 30 November 2002 and no overdue interest servicing. The terms of the extension were accepted by Dato' Tio. *Vide* yet another letter dated 7 April 2004 (p. 59), BCBB agreed to extend the maturity date of the term loan facility to 4 December 2004 subject to payment of an extension fee of RM6,000. In this letter of extension, BCBB had stated clearly that "this is a final extension and no further extension is allowed". PW1 conceded during cross-examination that she had no personal knowledge as to the issuance of these three extension letters.

[13] The court was referred to a letter from BCBB to Dato' Tio dated 26 April 2004 (p. 60) informing him about dividends received in relation to PHB shares pledged by both Dato' Tio (RM53,958.04) as well as Leovest (RM15,473.70) and seeking confirmation as to whether they would like to utilize the dividend to pay the extension fee of RM6,000 and to partially settle the overdue amount under Rights Issue Financing Loan Account 1408-0024831-950. Dato' Tio' s confirmation can be evidenced by his signature at the bottom of the said letter. Leovest's confirmation is given through its director, Dato' Tio, who signed and affixed the company chop at the bottom of the said letter.

[14] According to PW1, Dato' Tio did not settle the term loan by 4 December 2004. As a result, Messrs Raslan Loong, acting on behalf of BCBB, issued a letter of demand dated 15 June 2005 to him demanding payment of RM5,103,524.76 together with interest at the rate of 2% per annum above the BLR of 6% per annum and additional interest of 1% per annum above the prescribed rate on any amount overdue from 9 June 2005 until the date of full settlement. Unfortunately Dato' Tio did not make any payment following the issuance of the letter of demand.

[15] The following describes the various efforts that were made by BCBB in its attempt to get Dato' Tio to settle the outstanding sum. On 25 July 2005, BCBB wrote to Dato' Tio inviting him to provide an acceptable material scheme for the bank to consider an extension of the loan settlement. Despite this overture, no proposed scheme was received from Dato' Tio. Following the lack of response, BCBB issued a letter of demand dated 13 September 2005 to demand for payment of RM5,224,314.78 as the amount outstanding as at that date. There was again no response from Dato' Tio. A further letter dated 10 November 2005 was sent to demand for a sum of RM5,339,105.92 as at 4 November 2005 in respect of both the term loan as well as the overdraft facilities. Again, there was no response to this letter of demand.

[16] PW1 identified the letter dated 18 January 2006 (P2) issued by Messrs Adnan Sundra & Low, solicitors for BCBB, to Dato' Tio demanding for a sum of RM5,414,982.86 as at 31 December 2005 in respect of both the term loan as well as the overdraft facility. She admitted that she did not have personal knowledge that this figure was the actual amount owing as at 31 December 2005 but testified that the figure was derived from the bank's records. Dato' Tio had acknowledged receipt of the letter by appending his signature at the top portion of P2. The company chop of Polymate Industries (M) Sdn Bhd also appears below the signature. PW1 pointed out that the address of Polymate Industries is exactly the same as the mailing address of Dato' Tio. Again there was no response from Dato' Tio to this letter of demand.

[17] In respect of the disposal of the PHB shares, PW1 referred the court to two letters, both dated 4 January 2005, one from Dato' Tio and the other from Leovest, to BCBB authorizing it to dispose of their 5,450,307 shares and 1,563,000 shares respectively pledged to the bank with the sale proceeds to be credited into Dato' Tio's term loan account. The mode of disposal of the shares as stated in both letters is *via* "private placement that will be arranged by my remisier". It would appear that the first drafts of these two letters come from the bank and it was its intention that Dato' Tio and Leovest would issue back the said letters to the bank, which was duly done.

[18] In response to the requests in the two letters, BCBB had proceeded to sell two million PHB shares *via* private placement and had utilized the proceeds from the sale to offset part of the term loan facility owed by Dato' Tio. Reference was made to two

statements of account which show that two million shares were sold in two tranches on 4 January 2005 and 27 January 2005. Following this sale, Dato' Tio instructed BCBB to dispose off another two million of the pledged PHB shares in the open market at a price that was no less than RM0.80 sen per share. BCBB was instructed to contact Mr Koh Pee Seng of AmSecurities for further instructions. PW1 told the court that BCBB was unable to contact Mr Koh Pee Seng and as a result, the shares were not disposed off. PW1 admitted that she had no personal knowledge as to who had contacted Mr Koh (although she thought that the officer in charge at the time was an Encik Akmal) or whether the bank had written to Dato' Tio to inform him that they were\ unable to contact the said Mr Koh.

[19] PW1 referred the court to two certificates of indebtedness prepared by her to certify the total amount due under the term loan as well as the overdraft facility. Both certificates show a total outstanding amount of RM5,414,982.86 due under the said facilities as at 31 December 2005. The more detailed certificate (P1) would reveal that payment received from the sale of the two million pledged shares on 3 January 2005 and 27 January 2005 amounting to RM1,589,837 had been taken into account when arriving at the total outstanding figure.

[20] Akmal Hisham bin Aziz (PW2) is the Area Business Manager of CIMB Bank Berhad. At the material time between 1 October 2004 to 1 October 2005, he was the officer-in-charge of Dato' Tio's account and had liaised with him on behalf of the bank "especially in regards to the issues relating to the shares".

[21] PW2 admitted that at the request of Dato' Tio, he had on 4 January 2005 faxed the two draft letters as at pp. 63 & 64 and had received back the letters as in pp. 1 & 2. He explained that Dato' Tio had asked for the format and said that he would fax back the letters to the bank. He confirmed that the bank had sold off two million of the pledged PHB shares in two tranches of one million per tranche on 4 January 2005 and 27 January 2005 pursuant to private placement in accordance with the letters from Dato' Tio and Leovest dated 4 January 2005. Dato' Tio's remisier had only arranged for the sale of the two million shares and not the other five million plus shares. He agreed that by right, the bank can sell to whoever it deems appropriate and need not get Dato' Tio's consent to sell by private placement. The two million shares were sold for RM1,589,837 which comes to about 79 sen

per share. The court notes with interest that when PW2 was asked during cross-examination whether anyone from the bank was actually monitoring the price of shares that were pledged, his answer was a surprising: "Not that I am aware of".

[22] No more shares were sold after that. There were two reasons for this. Firstly, Dato' Tio had in his letter dated 16 February 2005 instructed the bank to dispose off another two million PHB shares in the open market at a price not less than RM0.80 sen per share over the next two weeks and the bank was to contact Mr Koh Pee Seng from AmSecurities for further instructions. Unfortunately, they were unable "to get hold of him" and hence the shares were not sold. It was not PW2 but someone from the securities department who tried to contact Mr Koh. He agreed that he neither wrote to Dato' Tio or to Leovest to inform them that the bank could not contact Mr Koh and there were problems about the sale of the pledged shares. Secondly, Dato' Tio had written a letter dated 29 June 2005 (p. 4) to the bank in which he had informed that there were buyers who had agreed to buy up his PHB shares at the end of the year and had requested the bank to give him some breathing space until the end of the year to settle the loan outstanding.

[23] In response to Dato' Tie's letter of 29 June 2005, PW2 replied on 29 July 2005 asking him to propose an acceptable settlement scheme within 14 days as the bank wanted to accord him an opportunity to pay up. However, no proposal was forthcoming. As a result BCBB issued the letter of demand dated 13 September 2005 (p. 65) demanding for an outstanding sum of RM5,224,314.78 as at 13 September 2005 and giving notice that the bank would proceed to dispose of the PHB shares that had been pledged as security for the term loan. It is PW2's evidence that the bank could exercise its right under cl. 14 of the memorandum of deposit of stocks and shares as Dato' Tio was already in default by failing to fully settle the Term Loan by 4 December 2004. The same clause also appears in Leovest's Memorandum of Deposit of Stocks and Shares. Based on these provisions, the bank had the discretion to decide when to sell Dato' Tio and Leovest's pledged shares. His explanation as to why the bank had not sold off the PHB shares appears in answer 18 of his witness statement when he said that PHB's share price was falling below what was feasible and as such it was not viable at the material time to sell the shares.

[24] In relation to item 10 of schedule 1 on the margin of advance, PW1 could not remember if the bank had ever requested Dato' Tio to pledge additional shares at any time. Until 2005, the value of the shares pledged was in the region of RM10 million. He admitted that he did not ask Dato' Tio for a top up of the security pledged when the value of the shares dropped below 60%. The Bank had in fact granted various indulgences to Dato' Tio including granting him various extensions to repay the facility.

[25] CIMB's third witness, Ho Yoke Teng (PW3), is currently a vice president of the bank. She had been the officer-in-charge of this account since she took over the file from PW2. With reference to the certificate of indebtedness as at 31 December 2005 (P1), PW3 confirmed that the amount owing under Dato' Tio's term loan and overdraft facilities as at 31 December 2005 is RM5,414,982.86. Since 31 December 2005 to date, he had not made any payments. As such, based on the calculations in P1, she was able to tabulate that the amount due and owing by Dato' Tio as at 2 February 2010 is RM7,772,586.15.

[26] During cross-examination, PW3 was queried as to the various letters of demand that were issued by her. She agreed that when she wrote the letter of demand on 13 September 2005 (p. 65), it was open to the bank to sell all the PHB shares but that none were sold. Following this letter Dato' Tio did not settle his outstanding account. She agreed that interest and the amount realized from the sale of shares was not indicated in her letter dated 10 November 2005 at p. 62. Again, Dato' Tio did not regularize his account following this letter.

[27] The plaintiffs final witness was Ramesh a/l Santhasivam (PW4), an advocate and solicitor with Messrs Adnan Sundra & Low. He testified that his firm was directed by BBCB to issue the letter of demand dated 18 January 2006 (P2) to Dato' Tio. He was the person in charge of the file and he admitted that it was he who signed P2. He directed that P2 be sent to Dato' Tio by AR Registered Post and the letter was acknowledged received as shown in the AR Card (P2A). The figure RM5,414,982.86 was obtained from his client. PW4 was not aware if this figure took into account the proceeds of the sale of shares.

Dato' Tio & Leovest's Case

[28] At the close of the CIMB's case, the court was informed by Mr Colin Pereira that Dato' Tio, the defendant in 22-314-2006 and Leovest, the plaintiff in 22-708-2006, did not intend to call any witnesses. The court was informed that counsel would be submitting that CIMB, the plaintiff in 22-314-2006, had not established a case on a balance of probabilities. In respect of 22-708-2006, the court was informed that Leovest would be relying on the documents in part A of the ikatan dokumen as well as the testimony of the plaintiff's witnesses to prove its case.

Evaluation Of The Evidence And Findings

[29] In coming to a decision in this case, the court has carefully considered the evidence adduced by CIMB's four witnesses and the documentary evidence tendered in support of its case. As no witnesses were called by either Dato' Tio or Leovest, and especially Leovest since it is the plaintiff in 22-708-2006, the court has to consider whether they had succeeded in their counterclaim and claim respectively notwithstanding the fact that they had not called any witnesses. In arriving at a decision, the court has been greatly assisted by the written submissions filed by both parties.

Effect Of Data Tio/Leovest Not Calling Witnesses

[30] Naturally, the first issue to be considered is the effect of and repercussions, if any, in both Dato' Tio and Leovest electing not to call any witnesses notwithstanding that Dato' Tio was actually present in court during the hearing. It must not be overlooked that in respect of 22-314-2006, Dato' Tio has filed a counterclaim for a sum of RM2,898,257.80 and alternatively, damages to be assessed. Further in 22-708-2006, Leovest has filed a claim against CIMB for damages suffered as a result of the failure of CIMB to dispose of the shares.

[31] Learned counsel for the plaintiff has submitted on a number of cases which have held that once a defendant in a civil suit submits that he has no case to answer and makes an election not to call any evidence, the evidence led by the plaintiff must be assumed to be correct. Reference was made to the case of *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509. In that case, the appellants were personal representatives of the deceased who was killed in a collision involving a motorcycle owned by the 2nd respondent and ridden by the 1st respondent.

The 1st respondent lodged a police report shortly after the accident. This police report was contained in Part II of the agreed bundle. However, there was a letter from the respondents' solicitors informing that: "We suggest that the police report ... be tendered through its maker dispensing with formal proof". At the trial, the only witness called by the appellants was the investigating officer who explained the sketch plan that he had prepared. At the close of the appellants' case, counsel for the respondents informed the court that the 1st respondent was not available to give evidence as he was out of the country. He then said that he was closing his case. The Sessions Court held that the police report was not admissible and dismissed the action on the ground that there was no evidence to support the allegation of negligence made by the appellants. The appellants' appeal to the High Court was dismissed and a further appeal was made to the Supreme Court.

[32] Learned counsel for the plaintiff had quoted from the judgment of His Lordship Gopal Sri Ram in the afore-cited case. However, the court notes that whilst the Supreme Court was in agreement that the appeal be allowed, however the reasoning of the members differed. The majority judgment and reasoning was that given by His Lordship Peh Swee Chin FCJ who held as follows:

> In the instant case, there was no intention expressed about making a submission of no case to answer, therefore there was no need for the trial court to put the defence to such election. Any such perceived intention was in fact very clearly contradicted by the defence referring to O. 28 r. 16(3) aforesaid applicable to the normal order of speeches in the Sessions Court. *The defendants had however chosen to close the case at the end of the plaintiff's case, they were entitled to do so though they would be in peril of not having the evidence of their most important witness and of having any adverse inference drawn against them for failing to call any such evidence* should the circumstances appropriately call for such adverse inference ... . (Emphasis added)

[33] The plaintiff has also relied on the Court of Appeal case of *Subry Hamid v. Husaini Tan Sri Ikhwan & Anor* [2006] 4 CLJ 50 where His Lordship Gopal Sri Ram JCA held that the test to be applied in a case where a submission of no case is made is as set out in the case of *Miller (t/a Waterloo Plant) v. Cawley* [2002] EWCA Civ 1100 as follows:

> Where a defendant was put to his or her election and elected to call no evidence, the issue was not whether there was any real or reasonable prospect that the claimant's case might be made out or any case fit to go before a jury or judge of fact. *Rather, it was the straightforward issue, arising in any trial after all the evidence had been called, namely whether or not the claimant had established his or her case by the evidence called on the balance of probabilities*. (Emphasis added)

[34] On the part of Dato' Tio and Leovest it was submitted that notwithstanding the fact that they had chosen not to call any evidence, it was still incumbent on CIMB to ensure that they complied with all relevant rules pertaining to the admissibility of documents and evidence. They argued that CIMB had failed to call the relevant makers of pertinent documents and as such the documents were inadmissible.

[35] The court finds that this issue is not as straightforward and simple as that stated by CIMB. It does not automatically follow that where a defendant calls no evidence, a plaintiff will succeed in its claim. The more accurate statement of the law is that which is stated by His Lordship Peh Swee Chin FCJ in *Jaafar Shaari (supra)*. The court finds that right from the onset of the case and even before any evidence had been adduced by CIMB, counsel for Dato' Tio / Leovest had already said that they did not intend to call any witnesses. This stand was further reinforced at the close of the case for CIMB when counsel once again reiterated that he did not intend to call any witnesses but would be submitting that:

(i) in 22-314-2006, CIMB had not established its case on a balance of probabilities; and

(ii) in 22-707-2006, Leovest would be relying on the documents in Part A of the agreed bundle and the testimony of CIMB's witnesses to prove its case.

[36] As such, going forward, the court will examine the evidence of CIMB's witnesses to see if it has made out its case against Dato' Tio on a balance of probabilities. In respect of *Leovest*'s case, the court will determine whether Leovest has succeeded in making out a case against CIMB on a balance of probabilities based only on the documents in Part A of the agreed bundle and the evidence of CIMB's witnesses.

Agreed Facts

[37] It is an agreed fact that CIMB (then BCBB) had granted Dato' Tio a term loan facility of RM6 million to enable him to subscribe to a PHB rights issue. It is also an agreed fact that the term loan facility is evidenced in a general facility agreement dated 30 November 2000 between BCBB and Dato' Tio upon terms and conditions as contained in the facility agreement. It is also not in dispute that BCBB had also extended to Dato' Tio an overdraft facility for a sum of RM50,000. It is also an agreed fact that the term loan was secured by 5,450,307 PHB shares belonging to Dato' Tio as well as 1,563,000 shares belonging to Leovest.

[38] Having established the agreed facts, the next question that arise for determination by the court is whether Dato' Tio had breached the terms and conditions of the general facility agreement. The court notes the evidence of Florence Gnana Sundari (PW1), a bank officer who had 36 years' experience with CIMB prior to her retirement. Although she may not have any personal knowledge of the letters of offer or the terms of the general facility agreement, however it is in evidence that she had come to know about the loan when the matter came to her department for recovery. The court thus accepts that PW1's evidence is based on the bank's records, and that based on such records she was competent to testify as to the facilities that were granted to Dato Tio.

[39] The court notes the evidence as regards the numerous extensions that were granted to Dato' Tio in respect of the term loan facility. Although repayment of the loan was initially described as a single bullet payment one year from the date of full drawdown, various extensions were given on the maturity date. There were a total of three extensions. The first offer of extension was dated 27 November 2001 and it referred to BCBB's letter of offer dated 19 October 2000 and the new extended maturity date of 4 December 2002. This extension offer was accepted by Dato' Tio as evidenced by his signature and personal particulars signifying his acceptance. Subsequent extensions, first to 4 December 2003 and then to 4 December 2004, were also clearly accepted by Dato' Tio.

[40] It has been submitted on behalf of Dato' Tio/Leovest that the documents relied on by CIMB to prove its case has not been properly admitted in evidence. This includes the two letters of

offer, the general facility agreement and the various letters of extension. It was submitted that since the makers of these documents "were not available for cross-examination the aforesaid documents are inadmissible and ought not to be considered by this Honourable Court".

[41] A number of authorities have been cited by counsel in support of the above contention. The court has carefully perused the facts of these authorities to ascertain their relevance and true import. The court finds that:

(i) In *Borneo Co (M) Sdn Bhd v. Penang Port Commission* [1975] 1 LNS 5, the Federal Court found that the respondent was aware that the documents in question namely the bills of lading, were in the agreed bundle. That being so, it held that it was too late in the day for the respondent to raise objections as to their admissibility or contents. The case of *Borneo Co (supra)* above can be easily distinguished from the facts of our instant case where the documents were in Part B of the common bundle where the admissibility of the documents were not in issue.

[42] In *Caley Ototo Worldwide Sdn Bhd v. Sun Wen Long* [2010] 1 CLJ 725, the plaintiff called only one witness whose entire evidence hinged on a "Mr Pishu" and what Mr Pishu had informed him. The said Mr Pishu was not called as a witness. Material shipping documents were not produced by the plaintiff. The High Court dismissed the plaintiff's case with costs. The court notes that in this case, the disputed documents were in the non-agreed bundle of documents quite unlike the facts in our instant case.

[43] In *Jaafar Shaari & Siti Jama Hashim (supra)*, the document in question, the police report, was contained in Part II of the agreed bundle. However, there was also a letter from the respondent's solicitors to the appellant's solicitors informing the latter in the following terms: "We suggest that the police report ... be tendered through its maker dispensing with formal proof". The Supreme Court said that the words "tendered through its maker" appeared to run counter to the subsequent words "dispensing with formal proof" and consequently held that the report could not be tendered without calling its maker.

[44] In *Tempil Perkakas Sdn Bhd v. Poo Sex Hong (t/a Agrodrive Engineering)* [1996] 1 LNS 99, there was no suggestion that the documents in question formed part of any agreed bundle. The High Court found that the person called by the appellants was not competent to testify about the various invoices and delivery orders. A facsimile letter purportedly containing admissions was held to be inadmissible, not having been properly produced by the person who received the facsimile.

[45] The High Court decision in *Allied Bank (Malaysia) Bhd v. Yau Jiok Hua* [1998] 2 CLJ 33 relied on Dato' Tio/Leovest was overturned on appeal to the Court of Appeal. In the High Court, the respondent had objected to the admissibility of various notices of demand on the ground that the maker was not called to give evidence. The learned judicial commissioner refused to allow the said notices of demand and AR cards to be admitted in evidence and consequently dismissed the appellant's case on the ground that he had failed to prove service of the notices of demand on the respondent. In allowing the appeal, Mohd Ghazali JCA held that the learned JC was wrong in refusing to admit in evidence the said notices of demand. Such evidence would be admissible pursuant to the provisions of s. 73A of the Evidence Act 1950 and the learned JC had the discretion to admit in evidence the said notices notwithstanding that the maker was not called.

[46] The court finds that in this case all the documents in question were, with the agreement of both parties, placed in Part B of the ikatan dokumen. The court finds that in the absence of any express condition regarding the inclusion of these documents in Part B, it would mean that "the documents therein are authentic and they do exist, therefore they require no proof of their authenticity by calling for eg, their makers". The truth of their contents however may be challenged in court at the instance of either party.

[47] The court finds that Dato' Tio and Leovest were misconceived when they contended that the documents in Part B were inadmissible without calling their makers. The court finds that on the contrary, the makers of the documents in Part B need not be called and the documents are in fact admissible. The court finds that PW1, as the head of credit administration in group asset management and in charge of recovery of loans, was in fact well situated to give evidence on the documents in the bank's files.

Was There A Breach?

[48] The court has considered counsel's submission that there was no breach on the part of Dato' Tio and thus no proper termination and recall of the term loan facility. A suggestion was made that since the repayment provision of the general facility agreement talks about repayment within one year from the date of the last drawdown and the date of the last drawdown was never pleaded in the statement of claim, consequently CIMB has not established that an event of default has occurred.

[49] The court has carefully considered this argument but find that it is without merit. As pointed out earlier, the date of the letter of offer was 19 October 2000, and yet the dates of maturity of the loan were 4 December 2002, 4 December 2003 and 4 December 2004. The three offers for extension with the new maturity dates were all accepted by Dato' Tio with no query or protest. The court finds that the date of drawdown is thus not an issue between the parties. Correspondences between the parties point to 4 December 2000 being the date of full drawdown, hence the dates of maturity eliciting no adverse response from Dato' Tio.

[50] The court finds that Dato' Tio did not settle the term loan by the final maturity date of 4 December 2004. *Vide* a letter dated 15 June 2005, Messrs Raslan Loong demanded payment of RM5,103,524.76 and additional interests. The court finds that no payment was made by Dato' Tio. *Vide* another letter dated 25 July 2005, BBCB wrote to Dato' Tio asking him to suggest an acceptable scheme so that the bank could consider an extension of the loan facility. There was no response from Dato' Tio to this letter. There were further letters of demand dated 13 September 2005 and 10 November 2005 for RM5,224,314.787 and RM5,339,105.92 respectively but these too elicited no response from Dato' Tio. Finally, a letter of demand dated 18 January 2006 (P2) was sent by Messrs Adnan Sundra & Low, solicitors for BCBB, to Dato' Tio to demand for a sum of RM5,414,982.86 as at 31 December 2005. The court is satisfied and accepts that the letter of demand P2 was duly issued to Dato' Tio and received by him as evidenced by his signature and the chop of Polymate Industries on the document, P2.

[51] As such, on this issue, the court finds that CIMB has established that an event of default has indeed occurred and that Dato' Tio, by failing to pay the amount claimed or to respond in any way to the letters of demand, was in breach of the facility agreement.

Right To Impose Default Interest

[52] Having found that the facility agreement was admissible, the issue as to whether CIMB had the right to impose default interest after 4 December 2004, the maturity date, is obvious from the facility agreement itself. Section 12.18 of the general facility agreement provides that in the event that the Borrower defaults in the payment of any sum covenanted to be paid, he shall pay additional interest at the default rate over and above the prescribed rate. The general conditions in schedule 2 states that the Prescribed Rate is BLR + 2%.

[53] In para. 7 of the defence, it was pleaded that by virtue of the extension of the time limit for repayment, CIMB was not entitled to charge penalty interest or default interest. The court finds this argument to be without merit as there was no further extension after the final extension expired on 4 December 2004.

The Certificate Of Indebtedness Clause

[54] In this case, CIMB is also relying on the conclusive evidence clause in the facility agreement. Section 12.12 of the facility agreement states as follows:

> It is hereby agreed that any admission or acknowledgement in writing by the Borrower or a judgement (by default or otherwise obtained against the Borrower) or a *statement of account in writing showing the Indebtedness of the Borrower which is duly certified by an officer of the Bank shall be binding and conclusive evidence against the Borrower for whatever purpose including as being conclusive evidence of the Indebtedness in a court of law*. (Emphasis added)

[55] Evidence was adduced in court as to two certificates of indebtedness prepared by PW1 to certify the total amount due under the term loan facility as well as the overdraft facility. The court finds nothing alarming about there being two certificates as both shows the same total outstanding amount of RM5,414,982.86 due under the overdraft and term loan facilities as at 31 December 2005. The only difference between the two is that one is more detailed than the other. The court notes that the more detailed

certificate (P1) shows that payment received from the sale of the two million pledged shares on 3 January 2005 and 27 January 2005 amounting to RM1,589,837 had been taken into account when arriving at the total outstanding figure of RM5,414,982.86.

[56] The court notes that Ho Yoke Teng (PW3), a Vice President of CIMB, had also confirmed P1 to the effect that the amount owing under Dato' Tio's term loan and overdraft facilities as at 31 December 2005 is RM5,414,982.86. However, this amount has now escalated to RM7,772,586.15 as at 2 February 2010 based on her tabulations as no payments had been made towards the account.

[57] On the other hand, counsel for Dato' Tio/Leovest has submitted that the right to rely on the certificate of indebtedness does not exist in the abstract and that since the facility agreement was not tendered through the maker, CIMB cannot rely on the said certificate. On this point, the court has already found that the facility agreement had been properly introduced in evidence in this case and hence finds that this argument to be without merit.

[58] It was further submitted by counsel for Dato' Tio/Leovest that even if the court were to hold that the certificate of indebtedness was admissible (as the court had held), it was also incumbent on the bank to produce all the accounts to show how it had tabulated Dato' Tio's liabilities as well as to show that there was no manifest or obvious error. The court has carefully perused the judgment of the Court of Appeal in the case of *United Malayan Banking Corp Bhd v. Chen Yin Khee & Anor* [2004] 4 CLJ 385 relied on by Dato' Tio/Leovest. Whilst it is true that the Court of Appeal found in favour of the respondent guarantors when it held that the appellant had failed to produce any *prima facie* evidence to establish the second respondent's indebtedness, there is no evidence that the appellant bank had relied on a certificate of indebtedness. As such, the facts of the above case can be clearly distinguished from the facts of our instant case.

[59] CIMB, on the other hand, has relied on the Federal Court decision in the case of *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544. The Federal Court, in allowing the appeal from a summary judgment application under O. 14 of the Rules of the High Court found that the Court of Appeal had misapplied the relevant principles relating to an application for summary judgment when it required the plaintiff to give further evidence of indebtedness. It upheld the certificate of indebtedness clause, also

known as the conclusive evidence clause, and said that "there is nothing to indicate or suggest any manifest error on the face of the said certificate nor is any fraud shown.". A

[60] The court has also perused the decision in the case of *Citibank NA v. Ooi Boon Leong & Ors* [1980] 1 LNS 168 where His Lordship Raja Azlan Shah CJ (Malaya) (as His Highness was then), in lending support for a conclusive evidence clause, held as follows: B

> In the present case, the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents ... It means that, **for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate**. (Emphasis added) C

[61] In light of the authorities as stated above, the court is satisfied that the conclusive evidence clause in s. 12.12 of the general facility agreement entitled CIMB to rely on the certificate of indebtedness (P1) as proof that as at 31 December 2005, a sum of RM5,414,982.86 was due and owing from Dato' Tio to CIMB in respect of the term loan as well as the overdraft facility. Although Dato' Tio had submitted that there was a clear and manifest error in the certificate of indebtedness as it was unclear whether the fixed deposit of RM264,000 had been deducted from the amount due to the bank, the court finds this contention to be without merit as PW1 had explained during re-examination that the fixed deposit had been cashed by the bank and would have gone to reducing the outstanding term loan amount which was stated as RM6,442,437.22 in P1. The court is of the view that merely querying PW1, for which a clarification was received, without more, does not reveal any "clear and manifest error" on the certificate of indebtedness itself. D E F G

[62] As such, on this issue alone, the court finds that on the certificate of indebtedness, CIMB would have been entitled to a sum of RM5,414,982.86 as at 31 December 2005 against Dato' Tio together with such interests and additional interests thereon as are provided in the facility agreement. H

Adverse Inference

[63] CIMB has pointed out that Dato' Tio was present in Court but did not give any evidence. He accorded no explanation as to why he had chosen not to give evidence save that he had elected not to do so. It was submitted that as such an adverse inference I

under s. 114(g) of the Evidence Act 1950 must be drawn against him. On the other hand, counsel for Dato' Tio/Leovest had submitted that s. 114(g) can only apply in circumstances where both Dato' Tio and Leovest had chosen to call evidence but in the course of tendering such evidence at trial, had failed to call relevant witnesses or to tender relevant documents.

[64] The court is unable to agree with the submissions of learned counsel for Dato' Tio/Leovest on this issue but is of the view that s. 114(g) is not restricted to situations where a party has called evidence. The court can do no better than to quote from the decision of His Lordship Peh Swee Chin FCJ in the case of *Jaafar Shaari (supra)* where he held that a defendant who chooses to close its case at the end of a plaintiff's case was entitled to do so, but would be in peril of not having the evidence of their most important witness but also of having an adverse inference drawn against them.

Disposal of Pledged Shares Issue

[65] On the issue of the bank's right to dispose of the PHB shares, the court finds that the memoranda of deposit of stocks and shares executed by Dato' Tio and Leovest clearly entitled it to sell the mortgaged property. Clause 14 of the two memoranda of deposit reads as follows:

> It shall be lawful for the Bank at any time or times hereafter during the continuance of this security without any notice to or any further consent or concurrence by me/us or either/any of us to sell the mortgaged securities or any of them in such manner and upon such terms and conditions generally as they think fit and to apply the net proceeds of any such sale in or towards the discharge of the moneys hereby secured. The Bank shall not be responsible for any loss from or through any brokers or others employed in the sale of the mortgaged securities or for any loss or depreciation in value of any such mortgaged securities arising from or through any cause whatsoever.

[66] The court finds the above provision to be clear and unambiguous. During the continuance of the security, CIMB has the absolute prerogative to sell or otherwise dispose of the pledged shares at any time it deems fit. The court finds that there was no legal obligation on the part of the bank to consult with Dato' Tio before disposing of any part of the pledged shares. Even if they had done so in the past or acted in accord and consonance with the wishes of Dato' Tio, such action cannot be regarded as imposing upon them an obligation to continue to so act.

Whether CIMB Owed A Duty Of Care

[67] Dato' Tio's counterclaim and Leovest's claim against CIMB is premised on their argument that CIMB owed them a duty of care to realize the best possible price for their shares that were pledged to the bank. They contend that had CIMB done so, the amount realized would not only have extinguished Dato' Tio's liability but would also have netted a profit for both parties.

[68] It is not disputed that Dato Tio had pledged 5,450,307 shares and Leovest 1,563,000 shares to CIMB as security for the term loan facility. Dato' Tio/Leovest complains that their instructions to CIMB to sell the pledged shares *vide* their letters dated 4 January 2005 was not carried out. Dato' Tio's further complaint was to the effect that his instructions to sell two million shares in the open market at a price not less than 80 sen per shares was not carried out. Further to that, they took issue with the bank's lack of response in informing them that they could not contact Mr. Koh Pee Seng and there was a problem with the disposal of shares.

[69] In this regard, the court has carefully considered the argument of Dato' Tio/Leovest that CIMB owed them a duty of care to realize the best price for the shares pledged. The court has perused the various authorities cited by counsel. The case of *Lembaga Kemajuan Tanah Persekutuan v. Mariam Mangu & Ors* [1984] 1 CLJ 225; [1984] 1 CLJ (Rep) 197 which involves an accident at work and *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585 which involves the collapse of a high rise block of apartments are totally different from the facts of our instant case and can be easily distinguished.

[70] CIMB, on the other hand has referred the court to the Privy Council decision in *China & South Sea Bank Ltd v. Tan Soon Gin, George* [1990] 1 CLJ 665; [1990] 3 CLJ (Rep) 398. In that case, the surety claimed that the creditor owed a duty of care in exercising its power of sale over mortgaged shares. It was claimed that the shares, as in our present case, were valuable when the debt became due and owing, but later became worthless when a demand was made on the surety. The surety claimed that the creditor knew or ought to have known of the declining value of the shares and should have sold them before they became worthless. Lord Templeman, in delivering the judgment of the Privy Council, held as follows:

In the present case the security was neither surrendered nor lost nor imperfect nor altered in condition by reason of what was done by the creditor. The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgaged securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all. If the creditor chose to sue the surety and not to pursue any other remedy, the creditor on being paid in full was bound to assign the mortgaged securities to the surety. If the creditor chose to exercise his power of sale over the mortgaged security he must sell for the current market value but the creditor must decide in his own interest if and when he should sell. The creditor does not become a trustee of the mortgaged securities and the power for sale for the surety unless and until the creditor is paid in full and the surety, having paid the whole of the debt is entitled to a transfer of the mortgaged securities to procure recovery of the whole or part of the sum he has paid to the creditor.

The creditor is not obliged to do anything. If the creditor does nothing and the debtor declines into bankruptcy the mortgaged properties become valueless and the surety decamps abroad, the creditor loses his money. If disaster strikes the debtor and the mortgaged securities but the surety remains capable of repaying the debt then the creditor loses nothing. The surety contracts to pay if the debtor does not pay and the surety is bound by his contract. If the surety, perhaps less indolent or perhaps less well protected as the creditor, is worried that the mortgaged securities may decline in value then the surety may request the creditor to sell and if the creditor remains idle, then the surety may bustle about, pay off the debt, take over the benefit of the securities and sell them. No creditor could carry on the business of lending if he could become liable to a mortgager and to a surety or to either of them for a decline in value of mortgaged property, unless the creditor was personally responsible for the decline. Applying the rule as specified by Pollock CB in *Watts v. Shuttleworth (supra)* at p. 247, it appears to their Lordships that in the present case the creditor did not act injurious to the surety, did not act inconsistent with the rights of the surety and the creditor did not omit any act which his duty enjoined him to do. The creditor was not under a duty to exercise his power of sale over the mortgaged securities at any particular time or at all.

[71] The court notes the evidence of PW2 that the bank had the discretion to decide on when to sell the pledged shares. According to him, PHB's share price was falling below what was feasible and as such it was not viable at the material time to sell the shares. The court finds this evidence to be entirely plausible when

considering that it was only able to dispose of two million shares at a price of 79 sen a share netting RM1,589,837. The court further notes that no evidence has been adduced by Dato' Tio or Leovest to challenge or rebut this evidence.

[72] In light of the court's finding that the bank was perfectly entitled to dispose of the PHB shares as and when it deems fit without having to consult either Dato' Tio or Leovest, and in light of the evidence of PW2 as to the infeasibility of disposing of the shares at that time in view of the falling prices, the court is satisfied that CIMB had not acted injurious to Dato' Tio or Leovest and had not acted inconsistent with their rights.

Confession And Avoidance

[73] CIMB has advanced an alternative argument of "confession and avoidance". It argues that Dato' Tio had not denied that he had accepted the loan and received the money. The court agrees that this is indeed so and Dato' Tio had not disputed that he had accepted the term loan. The court finds that Dato' Tio had, in his own letters dated 29 Jun 2005 and 9 August 2005 admitted that the loan was due and owing and had in fact extended his appreciation for the loan. In both letters, he did not dispute his liability for the loan but was merely asking for time to settle the debt.

[74] In the case of *Kulandi Muthu v. Subramaniam Velliappan* [1983] 1 CLJ 302; [1983] CLJ (Rep) 603, His Lordship Mohd Azmi FJ sitting in the High Court at Seremban, in dealing with the issue of burden of proof in a case of confession and avoidance, held as follows:

> It seems clear that the defence in this case was in the nature of confession and avoidance ... and as such the burden should be on the respondent to prove repayment of the RM6,000 loan. On the counterclaim, the burden is also on the respondent to prove the overpayment. ... The loan having been admitted, it is for the respondent to prove the repayment and overpayment on balance of probabilities in the evidence. If the repayment and overpayment had been made wholly or partly through applicant's wife and son, it is for the respondent to call them as witnesses ... Further, where the burden of proof is on the respondent, it is for him to put forward all relevant facts before the Court.

[75] Dato' Tio's reply to this argument is simply that he had pleaded a defence of set off and that this defence is an absolute one. His contention is that he had suffered losses as a result of CIMB's failure to dispose of the shares and these losses can be set off against CIMB's claim.

[76] On this issue, the court finds that based on the case of *Kulandi Muthu (supra)*, since Dato' Tio had admitted taking the loan, the burden thus falls on him to produce evidence to avoid liability. In light of his decision not to give any evidence in support of his case notwithstanding his presence in court during the hearing, the court finds, following its earlier finding that the bank had the absolute discretion on when to dispose of the shares pledged and the evidence of PW2 pertaining to the falling share prices at the material time, that Dato' Tio had failed to prove his defence of set off on a balance of probabilities. Similarly, the court finds that Leovest has failed to make out its case against CIMB on a balance of probabilities.

Conclusion

[77] As such, based on the evidence adduced in this case and having due regard to the law and decided cases, the court finds that in respect of case 22-314-2006, CIMB, the plaintiff, has made out a case against Dato' Tio for the amount of RM5,414,982.86 as at 31 December 2005. The court hereby orders Dato' Tio Sian Pah @ Teo Siam Pah to pay to CIMB the sum of RM5,414,982.86 together with interest of 6.5%+2%+1% on RM5,365,267.26 as well as interest of 6.5%+1.75% on RM49,715.60 from 1 January 2006 until the date of judgment and thereafter interest at the rate of 8% per annum until full settlement and costs. The court further finds that the defendant, Dato' Tio, has failed to make out its case against CIMB in respect of its counterclaim on a balance of probabilities and the court herewith dismisses his counterclaim.

[78] In respect of case 22-708-2006, based on the evaluation and findings, the court finds that the plaintiff, Leovest, has failed to make out a case against CIMB on a balance of probabilities. Leovest's claim for damages against CIMB is herewith dismissed with costs.